STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 264891 Oakland Circuit Court
DANNY LAMONTE SMITH, Defendant-Appellant.	LC No. 03-193039-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to rob while armed, MCL 750.89, assault with intent to murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 18 to 40 years' imprisonment for the assault convictions, and two years for each felony-firearm conviction. The trial court also ordered that defendant make restitution to the victim in the amount of $70,000. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the victim's pretrial and in-court identifications as tainted by an unduly suggestive photographic lineup in which defendant was the only individual depicted wearing glasses. "On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*.

The fairness of an identification procedure is evaluated in light of the total circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is not whether the photo lineup was suggestive, but whether it was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Id*. at 306. Generally, a photographic showup is not suggestive if it contains some photographs that are fairly representative of the defendant's physical features, and thus, are sufficient to reasonably test the identification. *Id*. at 304. A witness's initial inability to identify, or differences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others do not render a showup impermissibly suggestive. *Id*. at 304-305.

In light of the total circumstances, we do not conclude that the pretrial identification was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Id*. at

306. At the hearing on defendant's motion the officer in charge of this case, George Hartley, testified that to construct the photo array at issue he obtained the drivers license photographs of defendant and five other similar looking individuals from the Secretary of State. Although he acknowledged that defendant was the only individual in these photographs wearing glasses, Hartley testified that he wanted all the photographs in the array to have the same background, size, and "mug shot," in order to avoid tainting the identification. Ashley and Lindsay McCullough, both of whom witnessed the incident, independently picked photograph number three, which was not defendant's photograph. Hartley testified, however, that Lindsay was wavering between photograph number three and that of defendant, which Hartley stated was placed as photograph number two in the array and was very similar to photograph number three. Hartley further testified that the victim was the only one who identified defendant and that even he hesitated whether to pick photograph number two or three.

After hearing Hartley's testimony and reviewing the array, the trial court determined that the pretrial identification was not unduly suggestive. In doing so, the trial judge observed that the perpetrator was not wearing glasses at the time of the crime and that, under such circumstances, one would expect a witnesses to pick the photograph of a person not wearing glasses. The trial court further observed that despite the fact that defendant was the only one wearing glasses, two of the three witnesses shown the array picked out a different individual. We agree that these facts, which are clearly supported by the record, are a strong indication that the pretrial identification was not impermissibly suggestive. See *Kurylczyk*, *supra* at 304-305 n 12. Accordingly, we conclude that the photo identification was not unduly suggestive. The trial court did not, therefore, clearly err in declining to suppress the victim's photo identification of defendant. Because we find no clear error in the trial court's decision in this regard, we need not consider whether the victim had an independent basis for his in-court identification. See *id*. at 303.

Defendant next argues that he was denied his due process right to a fair trial because the prosecutor appealed to the jury's sympathy. We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights, i.e., error that was both obvious and affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham*, *supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor may argue the evidence and all reasonable inferences arising from it, but may not appeal to the jury to sympathize with the victim. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Watson*, 245 Mich App 542, 591; 629 NW2d 411 (2001).

In his opening statement, the prosecutor stated:

> Ladies and gentlemen, the evidence in this case is going to show that on July 30, 2003 [the victim] almost died. The evidence will show that he did not almost die

> as a result of an accident or any type of natural disease or by any type of natural causes.
>
> You're going to find that [the victim], on July 30th, was shot. Shot in the back. Shot in the leg. Not once, or twice, or three times, but was shot four times. The evidence is going to show the person that had the gun, the person that shot [the victim] as [the victim] was running away for his life, the man that shot him four times is that defendant, ...

Defendant argues that these comments distracted the jurors from their objective and unbiased appraisal of defendant's guilt or innocence, and denied him the right to a fair trial. We disagree. "Opening argument is the appropriate time to state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Moreover, a prosecutor may use emotional language and is not required to phrase his argument "in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Here, the prosecutor properly argued the evidence to be presented and the reasonable inferences arising therefrom. *Thomas*, *supra*. At trial, the victim testified that while running from defendant he was shot four times: once between his shoulder blades, once in his right thigh, once in his left elbow, and once in his wallet. James Janczyk, the surgeon at William Beaumont Hospital who treated the victim, testified that the injury to the victim's neck was life threatening because it was a couple of inches from the victim's spinal column and only a few millimeters from the internal carotid artery. Although strong, when viewed in context with the evidence ultimately presented and the reasonable inferences arising therefrom, the prosecutor's remarks did not amount to plain error. *Carines*, *supra*; *Ullah*, *supra*. Moreover, we note that the trial court instructed the jury that the lawyers' opening statements are not evidence and are only meant to help the jury understand the evidence and each side's legal theories, and that it could "not let sympathy or prejudice influence [its] decision in any way." The jury is presumed to have followed these instructions which, considering all of the evidence, cured any prejudice flowing from the prosecutor's comment. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Thus, any impropriety in the challenged comments did not affect the outcome of the proceedings, or otherwise deny defendant his right to a fair trial. *Carines*, *supra*.

Finally, defendant argues that he is entitled to an amended judgment of sentence because the restitution amount was not supported by a preponderance of the evidence. We disagree. We review a trial court's order of restitution for an abuse of discretion. *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005).

An award of restitution, if contested, must be proven by the prosecution by a preponderance of the evidence. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997); *Byard*, *supra* at 513; MCL 780.767(4). However, "[o]nly an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence." *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997). Absent an objection, the court is not required to order, sua sponte, an evidentiary hearing to determine the proper amount of restitution, and can rely on the amount recommended in the presentence report, which is presumed accurate unless defendant effectively challenges it accuracy. *Gahan*, *supra* at 276 n 17.

Here, the presentence investigation report indicates that the victim did not have medical insurance and "received approximately $70,000 in medical bills because of [this] offense," which, because of the victim's inability to pay, went to collections. At trial, both the victim and Janczyk testified that the victim suffered multiple injuries that required 12 days of hospitalization and a substantial amount of medical treatment, investigation, diagnostic, and radiologic interventions. In light of all the information available at the time of the sentencing hearing, the trial court required defendant to make restitution to the victim in the amount of $70,000. Because defendant failed to object to the restitution amount, the trial court was not required to conduct an evidentiary hearing and determine by a preponderance of the evidence that the amount of restitution was accurate. *Id.* at 276. The trial court could rely on the amount recommended in the presentence report, which was presumed to be accurate because defendant did not effectively challenge the accuracy of the information.[1] *Id.* at 276 n 17; see also MCL 780.767(1). Thus, the court did not abuse its discretion in determining the amount of restitution.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra

[1] In reaching this conclusion, we reject defendant's claim that his failure to object to the amount of restitution at the sentencing hearing should be excused because the trial court failed to determine on the record that defendant had the opportunity to read and discuss the presentence report, and to challenge the accuracy of the information in the presentence report, as required by MCR 6.425(E)(1)(a) and (b). Defendant does not claim that he did not have the opportunity to read the presentence report and does not point to any inaccuracy in the presentence report. Moreover, statements made by defense counsel and defendant on the record at sentencing support that they in fact had the opportunity to read the presentence report prior to the hearing and object to the accuracy of the report, but failed to do so. Given these facts, we are not persuaded that defendant's failure to object to the amount of restitution at the sentencing hearing should be excused.